ADDENDUM

Excerpt from Page 21 of Brief of Appellant in Court of Appeals.

"In the present trial, defendant sought to establish that Embry's arteriosclerosis was active and progressive and not dormant. Yet the evidence to this effect consisted of conclusions by medical witnesses who stated that these were medical definitions. All the doctors admitted that most men have arteriosclerosis in some degree, and many such men live normal lives to old age and die from other causes. Prior to the accident it is undisputed that Embry was leading a normal active life. It was implicit in the state court findings that Embry's diseased condition, discovered only by post mortem examination, had not disabled him in the slightest. Under the Kansas test for 'dormancy', his disease was obviously dormant for purposes of applying the terms of an accidental death insurance policy."

"5. The lower court opinion overruling plaintiff's motion for summary judgment erroneously stated that the test for dormancy was whether the prior diseased condition was 'unknown'. Thus, the case was ripe for summary judgment for plaintiff. Assuming, arguendo, an issue as to 'dormancy' remained to be tried in this action, the evidence presented in this trial conclusively showed the arteriosclerosis to be 'dormant' under the law laid down in *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765. Plaintiff's renewal of her motion for judgment at the end of the evidence therefore should have been sustained, in view of the state court's binding determination that the accident did precipitate, accelerate and cause Embry's death."

Excerpt from Page 8 and 9 of Reply Brief of Appellant in Court of Appeals.

"The trouble with defendant's argument is that under Kansas law arteriosclerosis is considered 'dormant' for accidental insurance loss purposes. *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d

765, approved and adopted the *Hooper* decision holding that admitted serious arterial disease which could have caused death in a matter of hours did not preclude recovery. The *Williams* case itself involved an admitted case of a diseased condition which would eventually have caused the disability which was accelerated by the accident. That undisputed fact did not preclude recovery.

Excerpt from Page 7 of Petition for Rehearing in Court of Appeals and from Supplement to Petition for Rehearing.

"II. The Court's Opinion Fails to Discuss and Apply Kansas Law Holding That Arteriosclerosis, Though Progressive, Is 'Dormant' in Determining Rights Under Accidental Death Clauses in Insurance Policies."

"28 U.S.C. Sec. 1738 provides in pertinent part that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.'

"The statute is applicable to state court judgments which are asserted to be binding in a federal district court within the state wherein that judgment was rendered. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166, 77 L.Ed. 231, 237-238, where it is said:

" 'The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts.' (citing the predecessor statute).

"In *Forsyth* v. *Hammond*, 166 U.S. 506, 518, 41 L.Ed. 1095, 1100, it was recognized, regarding a state judgment, that 'Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact . . . in the one action is conclusive between the parties in all subsequent actions.'

"Under Kansas law, dormancy of a disease is a different fact issue than the fact issue as to whether the disease has been aggravated by accident. The latter fact determined in favor of Mrs. Embry is entitled to full faith and credit."